

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

1. Claimant is employed as a truck driver for respondent. On August 21, 2001, claimant was injured when the wind caught the tarp he was unrolling and knocked him backward onto the ground.

2. Claimant injured his left shoulder and neck. He reported the accident but did not immediately seek medical treatment because he thought he had just pulled a muscle. On September 20, 2001, claimant began treatment with Dr. Brown. After a course of physical therapy did not provide relief, claimant was referred to Dr. Stechschulte and diagnostic testing including an EMG and MRI were performed.

3. Claimant was referred to Dr. Amundson and received a series of three epidural injections which only provided temporary relief. A discogram was then performed which revealed bulge/herniation at C3-4, C4-5 and degenerative disks at C5-6, C6-7. Dr. Amundson recommended surgery and it was scheduled for January 17, 2002.

4. On January 14, 2002, claimant received a letter from the insurance carrier denying his claim because the injury did not happen on the job. Although the insurance carrier denied the claim, nonetheless, claimant arranged for and proceeded to have the surgery.

5. Claimant had a history of a 1992 neck injury when hit by a manhole cover; a 1994 motor vehicle accident which required shoulder surgery; and, a 2000 head injury which required stitches after a bull kicked a gate which then hit claimant in the head.

6. Claimant also promotes and produces rodeos where he performs as the public address announcer. Claimant testified as the announcer he does what he can to entertain the crowd, including telling jokes, in order to fill the time between events.

7. Claimant was performing at a rodeo on December 7-8, 2001, at the Douglas County Fairgrounds. Claimant testified:

Q. (By Mr. Stang) On December 7th as part of your announcing activities did you reference your neck injury at all to the crowd?

A. Yes.

Q. In what capacity? Why did you do that?

A. I couldn't announce to my full capacity that night. I wanted to apologize to the crowd.

Q. Did you suggest that you had injured your neck while riding bulls or performing in a rodeo?

A. I did. I do some comic things. One of the bull riders got bucked off, and the clown said, "Hey, look, that bull kicked his hair off." And I pulled my hat off and said, "Yeah, one of them bulls kicked my hair off too," and things like that. That's how you entertain the crowd.

And then I remember another time on that 7th I said -- we had some bulls. There was two or three bulls that were circling the pen continuously, we couldn't get them out of the arena. And it got to the point where the crowd was just cracking up laughing. And I said, "Bulls, I'm getting ready to come down there and get you out myself." Not exact words but close to that. And then I said, "You know, that's probably how I got this neck injury," or something like that. I don't know how I put it, but . . .

Q. Was that meant to be in jest?

A. What I was doing at the time was -- the bulls were circling the arena continuously, and I was up there doing this (indicating), following the bulls, they wouldn't go out. I was having a lot of fun with the crowd. And I said, "This is why I have a neck injury." And they all laughed afterwards. It was a -- it was a lot of fun.¹

8. An investigator, Tiffany Ann Corbin, was conducting videotape surveillance of the claimant at the rodeo on December 7, 2001. Ms. Corbin testified:

Q. Okay. Specifically what did he say? Do you have a specific recollection of the exact words that he used, yes or no?

A. He stated that -- yes.

Q. What were the specific words?

A. He stated that in two weeks he was having neck surgery and this was due to him rodeoing.²

CONCLUSIONS OF LAW

The workers compensation act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that

¹Preliminary Hearing dated March 26, 2002, at 20-21.

²Ibid at 37.

right depends.³ “Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁴

Respondent argues the comments made by claimant while entertaining the audience at a rodeo reveals he suffered his neck injury while performing activities at some undesignated rodeo.

The audio portion of the videotape of claimant’s performance as the announcer at the December 7, 2001, rodeo at the Douglas County Fairgrounds supports and corroborates the claimant’s version of the events. During the course of the bull riding the claimant engages in playing music, conversations with the rodeo clowns as well as describing the bull riding event. The verbal exchanges clearly are intended to entertain the audience and in that context the comments claimant made cannot be considered an admission he was not injured during the course of his employment.

Moreover, the audio clearly corroborates claimant’s testimony rather than the report and testimony of the investigator hired by the respondent’s insurance carrier.

The Board affirms the Administrative Law Judge’s implicit finding that claimant suffered a work-related injury on August 21, 2001.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated April 1, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2002.

BOARD MEMBER

c: Michael H. Stang, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Workers Compensation Director

³K.S.A. 1998 Supp. 44-501(a).

⁴K.S.A. 1998 Supp. 44-508(g).